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ASSUMPTION OF RISK UNDER THE NEW YORK LABOR LAW.

The Supreme Court of New York has, in several decisions, been giving attention to an amendment to the Labor Law passed in 1909, changing the common law doctrine of assumption of risk. The latest case coming to our attention is reported in 45 New York Law Journal 1059, of date June 1, 1911, under the title, Chernick v. Independent American Ice Cream Co.

In that case three judges of the Appellate Division of that court held by a majority, that this amendment does away with assumption of risk, as matter of law, by reason of an employee continuing in service after he has discovered or been informed of the master's negligence in failing to keep working place or tools or appliances reasonably safe.

The start of the assumption of risk doctrine in Priestly v. Fowler in England, and in Murray v. South Carolina R. Co. and Farwell v. Boston & W. R. R. Corporation, in this country, the opinion in the last case being by Shaw, C. J, is well known It has been applied very strictly by some courts and very confusedly by others. All kinds of refining about master's superior knowledge; employee's equal opportunity to know of defect; inexperience of servants; sufficiency of warning; inspection by master; the right of servant to assume master has done his duty and obvious and glaring risks, have made of our law on this a medley, apparently getting worse the further it proceeds.

It certainly seems that here is presented and has been presented for some time a demand for legislation to get our courts out of the tangle they are getting into more deeply every day.

The New York legislature came to the rescue in an amendment of its Employers' Liability Act, whereby it provided that an employee "shall be presumed to have assented to the necessary risks of his employment and no others," which risks "are only those inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employees." So that the purpose of this enactment might not be possibly misunderstood, the law then goes on to say, that if the employer does neglect to do his duty and increases hazard, continuance in service after discovery by the employee, or he has been informed, of such neglect "shall not, as a matter of law, be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact."

This law seems to us a model enactment. It is one to which no employer solicitous for the lives and limbs of those to whose fidelity and skill he looks for success in his business should object and it is the only kind of a curb that may begin to restrain those who are otherwise.

We believe that it is the ill-paid employees, more than the skilled, that dangers not inherent to the business most affect. It is not of the dangers inherent to a business that intelligent workmen complain. They would no more think of objecting to dangers of the service than would a soldier, but it is the increased hazard that flows from neglect, careless or studied, because it is cheaper not to give to human beings the protection they ought to have.

Where labor is unskilled, can it afford, often, to abandon work because the employer's negligence has added obvious risks to

its performance, and that without one dollar's increase in remuneration? We never have heard where any employer has told his employees that because of his failure to keep their working-place as safe as it should be, he would increase their wages.

If he made a straight-out offer of that kind it would resemble something like trafficking in flesh and blood, and yet he does this very thing when he neglects his duty upon the assumption that employees will not quit.

But in whatsoever way me hay look at the matter, he would not have as much inducement to go into nice calculations upon the question whether it were more profitable to give a safe working-place or be held to a reasonable certainty of paying for neglect in this regard, if obvious danger arising from neglect were not an assumed risk.

Long ago the principle was evolved that a common carrier could not contract for non-liability for his own negligence, and the *rationale* of this principle lay in the fact, that he and the other party to the contract were not upon terms of equality.

How may anyone imagine a greater disparity in footing than that between an employer and an employee, when the latter, complaining of a defect, would be told that it was his privilege to quit if he did not like it? In the first place, it is not the habit of American workmen to run away from work, because there may be some increase of danger about it.

In the second place, with unskilled labor, with girls and women and children who work, there is a danger in the rear if they attempt to flee from that in front.

But there is policy enough and to spare for such a statute in the fact, that this judge-made doctrine, traveling around in our numerous jurisdictions and appearing in all sorts of shapes and disguises, needs the tyrant voice of a statute to discard it or prescribe for it definite limitations. We call attention to page 443, *post*, for a case, with annotation, selected as an illustration of the truth of what we are urging.

NOTES OF IMPORTANT DECISIONS

CONSTITUTIONAL LAW—PRESCRIBING PENALTIES FOR THE VIOLATION OF REGULATIONS TO BE MADE BY A DEPARTMENTAL OFFICER.—Mr. Justice Lamar treats very forcefully, in the case of United States v. Grimaud, 31 Sup. Ct. 480, the distinction between authority to make regulations, for the violation of which the statute authorizing regulation prescribes a penalty, and the prescribing of a penalty for violation of regulation, where the authorizing statute merely confers the power to make regulation and says nothing about penalty.

For a departmental officer both to prescribe the regulation and the penalty for its violation is ruled to be legislation, while to prescribe regulation, for violation of which a penalty is prescribed is held to be lawful.

As we gather the ruling, it is that notwithstandng it may be true, that a statute prescribing a penalty for violation of administrative regulations made thereunder would virtually denounce nothing punishable were no regulations made for the violation of which a penalty might attach, still the doing of that which makes legislation operative is not itself legislation.

It must be thought that this being true, the act of a departmental officer brings a statute, as affirmative legislation, into being from the moment he prescribes the regulation, and this being true, there ought to be statutory mode of promulgation to show the statute is, so to speak, law in esse and not in posse, that is to say, in actual and not merely potential effect.

From the early days of our government, Chief Justice Marshall found it "difficult to define the line which separates legislative power to make laws from administrative authority to make regulations," and it seems from a review of cases in the opinion by Justice Lamar, that courts have endeavored to respond to a necessity recognized to exist. Thus an excerpt is made from the case of Marshall Field & Co. v. Clark, 143 U. S. 694, as follows: "There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

This language seems general enough to vest a kind of roving authority in administrative officers, but we scarcely believe it is intended to say that a law-making body need not explicitly show what is the body of an offense denounced and that the things that "cannot be known to the law-making power" are any more than local circumstances or temporary condi-

tions connected with what is denounced. Going further than this seems to make of an administrative department something of a legislative force.

CONSTITUTIONAL LAW—STATUTE MAKING IT A MISDEMEANOR TO USE PORTRAIT FOR ADVERTISING PURPOSES.—The case of Sperry & Hutchinson Co. v. Rhodes, 31 Sup. Ct. 490, shows that a New York statute, passed in 1903, made the use of the name, portrait or picture of any living person for advertising purposes without his consent a misdemeanor. Before this act was passed it had been held by New York Court of Appeals that one could not prevent such use of her portrait by another who made and owned it. In a later case this court held that the statute applied only to photographs or portraits taken or made after it went into effect. Thereupon the later case was appealed under the above title upon the constitutionality of the law.

Mr. Justice Holmes disposes of this contention in a brief paragraph thus: "The Court of Appeals held that the statute applied only to photographs taken after it went into effect, as was the photograph of the plaintiff that the defendant used. The property was brought into existence under a law that limited the uses to be made of it, and if otherwise there could have been any question, in such a case there is none. Some comment was made in argument on the distinction between photographs taken before and after the date in 1903 as inconsistent with the 14th amendment. But the 14th amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and a later time."

The first sentence of this paragraph would seem to imply that the legislative power is broader with respect to the right to use property that is to be brought into existence than with respect to that presently owned. Similarly it might be said, that the same broader power would apply to property to be afterwards acquired by purchase, inheritance or any other means effecting a change of title. When, however, this is granted, a man's right to contract is substantially affected, and it is not clear how the police power may operate against that any more effectively than upon ownership. The right to manufacture is a right just as positive as the right to contract or the right to use what one owns. To take away one by virtue of the police power seems as direct a control over individual right to liberty and the pursuit of happiness as the other. If all of this be true it seems not a very illogical claim to make that there is a discrimination under the 14th amendment, unless there is substantial basis for classification between property owned at the time of the passage of the act and what may be manufactured conceding that the police power could extend to that as well as to what the act is construed to embrace.

It might reasonably be argued that there is room for such classification, but we doubt, however, whether the questions involved should have been disposed of so curtly.

A REPUBLICAN FORM OF GOVERNMENT: A DEFENSE OF THE ARIZONA CONSTITUTION.

Blackstone reminds us that ancient writers allow but three regular forms of government: monarchy, aristocracy and democracy. To depart from these forms is to unite elements found in two or all of them. Certainly within them is every element found in any government except a theocracy.

Governments were classified according to the person or persons in whom the supreme power was vested. A monarchy was where one person possessed this power, and no part of the people had any voice in the government. An aristocracy was where the supreme power was possessed by a single class, the strong class, known as aristocrats, and was exercised by their representatives. And if the number of the ruling class was very small it was called an oligarchy. A democracy was where the supreme power was in and exercised by the people.

The corruption of the ancient forms renders these designations inapplicable, and new names are applied. A monarch is, in theory at least, the source of all political power. And when shorn of a portion of his power, the government ceases to be a pure monarchy, and there is good authority for calling him a king. The laws of the Jews were established, and no political authority could change them, and when Sam-

uel anointed Saul he was called the king. The Jews could not have a monarch.

In some ancient instances the people maintained the right to choose their own rulers. In later times, kings have governed in obedience to constitutions. And in every such case something is added in order to more correctly characterize the form of the government. We call it a limited or constitutional monarchy. This is where all power has been, at least in theory, lodged in a single individual, and he has yielded or been compelled to yield a part of it. Such at one time was the English government.

In still other instances, by revolution or otherwise, the people have become possessed of all political power, being in a state of anarchy or condition of democracy—for democracy is but anarchy called to order—and without surrendering the power absolutely, have authorized others as their representatives to exercise it in whole or in part. For a government thus established it was convenient to have a name. It was called a republic. Such has been the British government since the people seized the supreme power and cut off the head of the king.

And to more particularly specify, depending upon the extent to which the popular power is delegated, the manner of delegating it, and to whom it is delegated, we refer to such government as an aristocratic, representative or democratic republic.

Great Britain is an aristocratic republic. There is no controversy about this. The government was instituted by the people, and they have power to alter it. The aristocracy is represented by the house of lords, the plebeians by the commons, and all the people by the king. Whether the United States are or shall be a representative or a democratic republic has been a controversy from the beginning. Probably no one has pointed out the precise distinction between a representative and democratic republic. But all agree that such a distinction exists.. And it is generally assumed that our national government is representative in form, and the controversy has been rather in reference to its modification than as to its chararacter. In its organization the people delegated all political power except that of choosing directly and indirectly a part of the public officers. With this many were always dissatisfied. This dissatisfaction is now becoming general, and is making itself most strongly felt in the several states, where in their local affairs the people are reclaiming a part of the power heretofore exercised by their officials.

The agitation has given rise to the question whether in order to maintain a republican form of government within the meaning of the Constitution, the people of a state shall be governed wholly by representation, or whether they may be governed only in part by their representatives, reserving the power to act on their own behalf when deemed necessary for their protection or benefit.

That there shall be a controversy as to the merits of the two methods is natural. But that it shall be asserted that government wherein the people reserve to themselves certain ultimate powers is not, by reason of such reservation, republican in form, is inexcusable. It is dangerous. It amounts to an assertion that we have been misled from the beginning. It shows that we are not as far from the doctrine of the divine right to rule as we thought we were.

No one is misled as to the principal source of the opposition to the initiative and referendum, or as to the reason for it. There are those who have the advantage of the rest of us, and desire to hold it, and know that they can do so while the old arrangement continues. They discourse beautifully upon the merits of government of the people, by the people, and for the people, but expect the afflicted masses to declare to them, as Job to his tormentors Eliphaz, Bildad and Zophar: "No doubt but ye are the people, and wisdom shall die with you."

If the masses had as much influence with public officials—as much power in the government—as the privileged classes have, probably they would be satisfied, at least for the present, with a purely representative government. For the few who have

monopolized the resources and secured control of the wealth and business of the country may stalk unannounced into the White House, committee rooms of Congress, and other high places, while Jesus Christ himself would have to knock at the back door for a hand-out. But, however well satisfied the official and privileged classes may be with their positions and privileges, the proposition that the people have no rights but by representation will not in the end prevail.

That the popular right of self-government in so far as necessary for self-protection is subversive of our republican institutions is the most dangerous doctrine proclaimed since the declaration of the state-right of nullification. Nothing just now could give rise to greater dissatisfaction with our institutions. Since the Declaration of Independence the people have been taught, and now believe, that the right of self-government for self-protection is superior to any form of government; and however patriotic they may be, convince them that the plan of our government precludes the exercise of this right and they will declare against the plan—declare against the government.

The masses have been taught, the very children believe, that ours is a government of the people; that there is nothing the people cannot rightfully do when necessary for their protection. Let it be declared officially and finally that this is not true; turn all our patriotic convicions and sentiments into ridicule, and our boasted government of the people, by the people, and for the people will become a delusion, and socialism and anarchy will develop as they have developed in no country before. The people will conclude that if the government does not admit of the exercise of the right of self-protection, which they deem a sacred right, it is unfit for the emergency confronting us. The dangerous sentiments of socialism and anarchy have already grown to alarming proportions on account of the difficulties in the way of exercising the right, the people believing the right itself exists.

Logically we are told to amend the Constitution. This brings us back to the starting point. We can only amend it by representation. And it requires two-thirds of both houses of Congress, or the legislatures of two-thirds of the states, to initiate an amendment, and the legislatures of three-fourths of the states, or conventions in three-fourths of the states, to make it effective. Some thirty persons and estates are said to control some eighty-five per cent of the wealth of the country, and by the one method some thirty-three of their friends can prevent an amendment to the Constitution, while the people may be practically unanimous in favor of it. The fact that at best a generation must submit to what they understand to be a wrong, suffer injustice, and pass away, before a single amendment in favor of popular rights can be accomplished, emphasizes as few things else can, the unfitness of a purely representative government for a liberty-loving and intelligent people.

The Revolutionary Fathers felt their most grevious personal wrong and saw their most obvious individual rights; but their struggle in the main was for independence, and not for freedom; to establish a separate government, and not fix the status of man. Many of them were slave-drivers. Some were religious bigots. A few would have persecuted their neighbors. Individual rights were an incident to the controversy, but they were not contending for an enlargement of their rights under the law. And had the mother country accorded to them the rights enjoyed by British subjects at home, the separation would not have taken place at that time, if at all. And article 5 of the Constitution, providing for its amendment, excludes all thought of the rights of citizens. It was drawn with a view to guarding the intensely jealous rights of thirteen small states as such. And the jealousy was not that of individuals or classes of individuals, but of petit commonwealths, which found its culmination in the experiences of 1861 to 1865. And nothing would do more to allay present dissatisfaction than the amendment of this provision

of the Constitution, by placing the power of future amendments in the hands of the people, and making it easy and direct.

That a thing may ultimately be accomplished is not sufficient. Previous to the introduction of modern power and machinery, conditions changed slowly. The public lands and national resources seemed inexhaustible. Monopoly was impossible. But many things have happened since then. And while we are interested in our children, this interest in the future does not reconcile us to the wrongs of the present. If only interested in posterity, we might wipe the nation from the map and confidently expect an intelligent people to rise from anarchy and construct a better one in time for our children to enjoy the benefits of it. But the promises of God are not exclusively of blessings postponed, they are: "In blessing I will bless thee." And what the people demand is relief now—for themselves as well as for their children.

Great Britain is a republic, though having a king and house of lords, and being truly representative of the people only in one branch of the legislature. The United States are a republic, though the people directly choose only one branch of Congress. And the several states are republican, though they choose both houses of the legislature and the governor, and in most cases the judges, by popular vote. These facts make it plain that a republican government is a comprehensive institution. Just how far must a government be representative in order to be republican? We find one republic some one-sixth representative, another probably one-half representative, others two-thirds representative, and still others wholly representative.

The constitution of Great Britain, if it may be truly said to have a constitution, is unwritten. While officers not chosen by the people, but deriving their authority from "above," or from written and unwritten constitutions, are vested with all power not pertaining to the representatives of the people, no question is raised as to the form of government. But when in organizing or altering the government the people undertake to retain or regain a portion of this power, it is asserted that the government ceases to be republican in form! This is the gist of the controversy. What then is a democratic-republic, that kind of government dear to the American people since the days of Jefferson?

And it appears that republicanism is not inconsistent with other forms of government, but may exist in connection with them. Bouvier and others set it down as consistent even with a monarchical form of government. And that it cannot be maintained in connection with democratic principles is a new doctrine.

The Constitution was so drawn as to preclude the possibility of the establishment of an aristocratic-republic in any state, by the prohibition of a titled class. But democracy—the power and the authority of the people—was recognized from the first. "We, the people of the United States," made the Constitution and adopted it. And "we, the people," took care to provide that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The framers of the Constitution were acquainted with history and existing conditions. They knew that nations as well as provinces had frequently passed from the control of one prince to another, and that the forms of government had changed. We know that such things have happened since, and been brought close home to us. The colonies had passed through such experiences. And they knew that if the young states were left to protect and defend themselves severally they would be subject to conquest from without and revolution within. The states were forbidden by the Constitution to "enter into any treaty, alliance, or confederation, grant any letters of marque and reprisal, coin any money, emit

bills of credit, make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, or grant any title of nobility." And "no state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Having thus destroyed the sovereign character and limited the powers of the states, to the end that they might be welded into "a more perfect Union," in order "to establish justice, insure domestic tranquility, * * * promote the general welfare, and secure the blessings of liberty * * * " it was altogether fitting and proper that "the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or the executive—when the legislature cannot be convened—against domestic violence."

This is all there is on the subject. No effort is made to define a republican form of government. It is purely a political guarantee—an assurance of armed protection in case of need. It presents no legal question, or question for a court. It is a question of war, and as far from the jurisdiction of the courts as whether we will go to war in any other case.

Relative to the form of government in the states, the Constitution is self-executing. No state can become or remain a part of the Union unless it is republican in form. And this guarantee is an assurance that the Union shall not be broken by invasion, usurpation or rebellion, and that the national government will interpose with force of arms to prevent it, as it has done without consulting the courts.

The direct connection between the national government and the states, as originally made, is in the Senate; and with the people of the states, is in the House of Representatives.

Every state must have an executive, judicial and legislative department, and the members of the most numerous house of the legislature must be elected by the people, or the state cannot sustain its relation as a member of the Union.

It must have an executive, because he only can issue writs to fill the representation in Congress, or fill a vacancy in the office of United States senator, or call upon the United States to suppress domestic violence when the legislature cannot be convened, or demand from another state the return of a fugitive from justice. It must have judges, who shall make oath or affirmation to support the Constitution, and enforce the Constitution and treaties of the United States as the supreme law of the land. And it must have a legislature; for by it United States senators are chosen; and the times, places and manner of choosing senators and representatives are prescribed; and the manner of choosing presidential electors is provided for; and the assistance of the national government, when it can be convened, is demanded to suppress domestic violence; and amendments to the Constitution may be proposed and ratified.

And unless thus equipped, a state cannot be admitted into or remain in and sustain its relation to the Union on an equal footing with the original states. And being thus equipped, it is republican in form, and nothing more can be demanded of it. In what manner it shall enact or may repeal its laws; or shall choose or may remove its officers, except it must choose the most numerous branch of the legislature by election; or how it shall conduct its domestic affairs, is not a right enumerated in the Constitution, or a power delegated to the United States by the Constitution; nor is it a right or power prohibited to the state by the Constitution. But it is a power and right expressly reserved by the Constitution to the state, or to its people, which may not be denied or disparaged.

In that provision is made only for the the choosing of the members of the most numerous branch of the legislature by election is found no reason for assuming that the constitutional requirements are not complete. It is true that in practice the states choose both houses of the legislature and the governor, and usually the judges, by popular election; but this is not because the Constitution requires it, but because the people chose to do it this way, and under their reserved powers have the right to do it, for the same reason that they may go further if they like, and recall their officers, or initiate, pass or repeal their laws.

That only the members of the most numerous branch of the legislature should be required to be chosen by election is entirely consistent with the conduct of national affairs before and after, as well as in and by the Constitution. In establishing the territory northwest of the Ohio before the constitution was established, it was provided that only the most numerous branch of the legislature should be elected by the people. When the national government was finally established, it was provided by the constitution that only the most numerous branch of Congress shall be elected by direct vote of the people. And later the same provision was made as to the territory southwest of the Ohio, and the territory of Louisiana, and the territory of Indiana, and other territories. And the extension of the right to choose other officers by election, to enact their own laws, and conduct their own affairs, to the territories, is but a recognition of the right and power the states have always enjoyed.

Many of the states, some thirteen in number, since the original thirteen, have come into the Union without enabling acts. Three of them at least instituted and maintained state governments, enacting and enforcing state laws, previous to their admission. In at least one instance this was with the sanction of the president. And in at least one case a law so enacted and applied came before the Supreme Court of the United States upon the question of its validity. And the court dismissed the proceeding upon the ground that the question involved was a political one. So that if the President and Congress do not interfere, the relation of a state to the Union, by whom and in what manner its officers are removed, and its laws enacted and repealed, and its domestic affairs conducted, are not questions for the courts.

Just now the Arizona constitution is the principal object of attack. No explanation of the true local situation has gone out to the country. The constitution was ratified by approximately 80 per cent of the votes. There was some honest opposition to it, but in the main the opposition was subservient to political and business interests of such character as of which the people have great and just cause to complain, as an analysis of the vote would show. But this is the province of the newspaper or popular magazine.

Plausibility is sought to be given to the opposition by asserting that the constitution is unconstitutional, by reason of the provision of the enabling act, requiring that the constitution "shall be republican in form * * * and shall not be repugnant to the Constitution of the United States * * * ." And it is asserted that the initiative and referendum, and recall, are unrepublican and repugnant to the Constitution of the United States.

The entire requirement is that, "the constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States or *the principles of the Declaration of Independence.*"

And in addition to what has been said, for and on behalf of a people with as good average of education, intelligence and morals as may be found anywhere under the flag, it is sufficient justification of their conduct in framing and asking statehood under this constitution to add that:

"We hold these truths to be self-evident, that all men are created equal, that they are

endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, *deriving their just powers from the consent of the governed. That * * * it is the right of the people to * * * institute government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.*"

HENRY H. HOWARD.

Phœnix, Ariz.

MASTER AND SERVANT—ASSUMPTION OF RISK.

HERMANEK v. CHICAGO & N. W. RY. CO.

Circuit Court of Appeals, Eighth Circuit, March 29, 1911.

186 Fed. 142.

An employee does not assume the risk by continuing to work a reasonable length of time with worn and defective tools, after having notified the employer or foreman standing in the employer's place of the worn and defective condition of the tools, and obtaining a promise that new or repaired ones would be obtained and furnished, and this whether the defective tools were simple or complex.

WM. H. MUNGER, District Judge: This action was brought to recover for a personal injury sustained by plaintiff while in the employ of the defendant as a section hand at work upon defendant's line of road. The injury occurred while plaintiff and a coemployee were in the act of pulling a spike out of a tie by the use of a clawbar and spike maul; plaintiff holding the clawbar, and his coemployee using the maul to drive the clawbar under the head of the spike. While thus working, the head of the spike broke off and struck the plaintiff in the eye, causing the injury complained of.

The negligence charged against defendant is that it failed to furnish the plaintiff a proper and safe clawbar with which to draw spikes; the clawbar in question having become worn in such a manner that the head of the spike was more likely to be broken off than with a perfect bar, with sharp edges, which would catch against the body of the spike. At the close of the evidence the trial judge directed a verdict for the defendant, and the case is brought here for review.

Four questions have been presented and argued: (1) Did the plaintiff assume the risk of an injury of the character in question? (2) The accident resulting from the ordinary use of a simple hand tool, and there being no hidden dangers, and no complications connected with the use of the same, was there actionable negligence on the part of the defendant? (3) Was the plaintiff guilty of contributory negligence, in that, with full knowledge of the dangers incident to driving a clawbar under the head of a spike with a spike maul, he stood directly over the spike, in a position where injury would naturally result if the head of the spike flew off? (4) Was the negligence, if any, of John Barry, the foreman, the negligence of a coemployee, for which the defendant would not be liable?

(1) The evidence discloses that the railroad company kept a stock of tools, including clawbars, on hand at its shops in Clinton; also repaired and sharpened bars that were sent there; that it was the practice and duty of Barry, defendant's section foreman, when the tools became worn and needed repairing, to send them to Clinton for repair, and either other like tools, properly repaired, were sent the foreman, or the defective and worn ones sent in were repaired and returned to him; that it would take two or three days to send the tools from the section upon which plaintiff was working to Clinton to have them repaired and returned. Such being the case, Barry, the section foreman, was not a coemployee in respect to this particular matter. The duty to furnish the plaintiff with proper and suitable tools was a positive duty of the defendant. Barry, the section foreman, was the employee to whom the defendant had intrusted the duty of seeing when the tools upon his section required repairing, and the duty of having them, when worn and needing repair, sent to defendant's shops for that purpose; and, as the duty of furnishing suitable and safe tools was a positive duty imposed upon defendant, it having delegated that duty to Barry, he was not, in that respect, a coempl yee of defendant. Hough v. Railway Co., 100 U. S. 213-219, 25 L. Ed. 612; Northern Pac. R. R. Co. v. Peterson, 162 U. S. 346-353, 16 Sup. Ct. 843, 40 L. Ed. 994; Homestake Mining Co. v. Fullerton, 16 C. C. A. 545, 69 Fed. 923.

(2) The evidence discloses that the plaintiff, on one or two occasions before the injury

in question, complained to Barry, the foreman, of the worn and defective condition of the bars in question, and that they were dangerous to use; Barry stating in response thereto that he would fix them or send them to Clinton to be fixed. Whether the evidence in this regard shows a specific promise upon the part of Barry to procure new or repaired bars, that plaintiff so understood Barry's promise, and relied upon the same, is not altogether clear; but the evidence in this respect is of such a character that it should have been submitted to the jury to say whether or not Barry's statements to plaintiff were intended by Barry, and understood by plaintiff, to be a promise that new or repaired tools would be furnished, and whether plaintiff continued to work with the tools, relying upon such promise. The law is that an employee does not assume the risk by continuing to work a reasonable length of time with worn and defective tools, after having notified the employer, or the foreman, standing in the place of the employer, of the worn and defective condition of the tools, and obtained from the employer, or foreman, standing in his place, a promise that new ones or repaired ones would be obtained and furnished. Hough v. Railway Co., supra; Homestake Mining Co. v. Fullerton, supra; Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306, 125 Fed. 470.

(3) Upon the question as to whether the clawbar, by reason of the edges of the claws being worn and dulled, would not take hold of the spike as far below the head as a sharp one would, thereby rendering it unsafe for use, the evidence was conflicting, so that it was for the jury to say whether the head of the spike broke off because of the use of the dull and worn clawbar, and whether such condition was the proximate cause of the injury. No sound reason exists for a different rule being applied to a simple tool than to a complex one, when the defective and dangerous character has been called to the master's attention by the servant, and a promise made by the master that the defect would be remedied or a new tool furnished. Louisville Hotel Co. v. Kaltenbrun, 80 S. W. 1163, 26 Ky. Law Rep. 208. To the same effect may be said to be Cudahy Packing Co. v. Skoumal, supra.

(4) Whether plaintiff was guilty of such contributory negligence, as to defeat a recovery by standing with his face downward directly over the spike which was being drawn was clearly a question of fact to be submitted to the jury.

The judgment is reversed, and a new trial granted.

ADAMS, Circuit Judge, dissents.

NOTE.—*Assumption of Risk and its Suspension by the Master's Promise to Remedy Defect.*—The principal case is selected for this issue of our journal more to illustrate our position in our editorial on the amendment to the New York Labor Law, at page 435, of this issue. In the principal case we see that a verdict was directed for the defendant and this ruling reversed by a majority of two to three—thus making the four judges participating standing equally divided and the reversing judges asserting that there is no assumption for a reasonable time succeeding a promise to repair. But according to other cases, even such a promise does not so operate unless the promise is relied on. Thus see St. Louis & S. F. R. Co. v. Phillips (Ala.), 51 So. 638; St. Louis, I. M. & S. Ry. Co. v. Holman (Ark.), 120 S. W. 146; Medlin Milling Co. v. Schmidt (Tex. C. A.), 126 S. W. 689. Other cases state it in this way, viz.: that the employer is taken by his promise impliedly to agree for a reasonable time to assume the risk of injury himself. Brouseau v. Kellogg Switchboard & Supply Co., 158 Mich. 312, 122 N. W. 620; Buckner v. Stock Yards Horse and Mule Co., 221 Mo. 700, 120 S. W. 706. And then this is again qualified by the circumstance that the defect shall not make the work so imminently and obviously dangerous that an ordinarily prudent person would refuse to continue to work until the defect is repaired. Elie v. C. Cowles & Co., 82 Conn. 236, 73 Atl. 258; Hartman v. Reading Wood Pulley Co., 38 Pa. Super. Ct. 587; Scott v. Parlin & Orendorf Co., 245 Ill. 460, 92 N. E. 318; Comer v. Meyer (N. J.), 74 Atl. 497. But qualification seems to be denied in some cases or, at least, itself again qualified. St. Louis, I. M. & S. Ry. Co. v. Holman (Ark.), 120 S. W. 146.

We may take it, therefore, that the promise of the master cannot be repeated again and again so as to continue the suspension, for when the servant has good reason to believe he is merely lying, the law requires of him to so treat his employer; all of which seems to us to be opposed to the general principle of estoppel and generally inconsistent with itself.

We may find with little search decision upon decision that the master's positive duty to furnish a safe place and safe appliances entitles the employee to assume without necessity of inspection that he has complied with this duty. We have statutes requiring specific things to be done in and about certain working places, and when the master fails either as to his general or special duty, and just because he openly and flagrantly fails, he is allowed to set up his own wrongful conduct against liability.

Courts, seeing the absurdity (possibly this is not too strong a word) of allowing a master this unique defense, have been trying to mitigate its rigor by raising an implied assumption upon an express promise to correct the situation and then declaring that when the servant does not implicitly rely on it or if the defect is very obvious and the danger very imminent, it shall not operate at all. There was never more need for it to operate than in the latter situation, nor a stronger encouragement for the master to allow danger to be just a little more obvious and imminent than it otherwise would be. But the promise itself is nothing more than a promise to fulfill a promise—that is to say, to comply

with an implied representation as to place and appliances being safe.

Right here we should notice another feature of the New York law not instanced in our editorial. That part of the law requires the servant to call the master's attention to defects he has discovered of which the master is ignorant, and this presumes that the master stands ready to correct them or stand the consequences of his neglect of duty.

The courts of our numerous jurisdictions are theorizing all on their independent lines about how closely they shall stick to the doctrine of Priestly v. Fowler and its congenor in Massachusetts, decided by Chief Justice Shaw, and regard those cases more as bases for speculation in the midst of changed conditions in our industrial world, than as edicts with the unchangeableness of a law of the Medes and Persians. Consequently we need a statute on the subject and it needs to be uniform just as badly as a law respecting negotiable instruments, insurance or a bill of lading. It affects interstate business directly, to say nothing about manufactures which are local being essentially less in that way than ever before in the history of our country.

Crossing state lines for raw material or for distributing products is getting to be relatively as unimportant as crossing county lines. The whole question resolves itself into one of tariff in transportation. Trade territory knows no state lines. C.

CORAM NON JUDICE.

REFORM OF CIVIL PROCEDURE IN NEW YORK.

On April 26, 1911, we called attention to the fact that Hon. Elihu Root, President of the New York State Bar Association, pursuant to a resolution of that association, had appointed a committee to consider the subject of reform of civil procedure in the State of New York, consisting of Adolph J. Rodenbeck, William B. Hornblower, John G. Milburn, Adelbert Moot and Charles A. Collin. There is printed on the first page to-day a bill recently introduced in the Legislature by which the Board of Statutory Consolidation, of which the four gentlemen first named were members, with Mr. Collin appointed to fill a vacancy, is continued, such Board being directed to report to the next Legislature a plan for the classification, consolidation and simplification of the civil practice in the courts of this State. It is provided that the members of the Board shall serve without compensation, but that their necessary expenses and disbursements shall be reimbursed to them out of an appropriation made for that purpose.

In our former editorial we discussed the matter of reform of civil procedure at some length. The present bill follows the precedent of chapter 664 of the Laws of 1904 in naming the members of the Board in the act of appointment. It is universally recognized that the New York Code of Civil Procedure is a grievously objectionable instrument, both in its organic construction and in matters of detail. The distinguished reputation of the gentlemen named, as well as the satisfactory work performed by the Board of Statutory Consolidation in preparing the Consolidated Laws, are a guarantee that the new duties imposed will be discharged with great ability and conscientious faithfulness. It is only proper that if the members are willing to serve without compensation, at least their expenses and disbursements should be defrayed at the public expense. In our former article we called attention to Judge Rodenbeck's pamphlet outlining a scheme entertained for revision of the Code. The proposed act, it will be noticed, directs the Board 'to report to the next Legislature a plan for the classification, consolidation and simplification of the civil practice," etc. This apparently leaves it discretionary whether to illustrate such plan by an entire proposed practice act or only by portions of one.

The passage of the bill continuing the Board of Statutory Consolidation in office, of course, would not commit the Legislature to the adoption of such report as may be rendered. Whether or not the immediate or the ultimate results of its work shall become law in our judgment ought to depend upon whether or not the revision is sufficiently radical, that is to say, upon how far the scheme is followed of a comparatively short statute dealing with generalities, leaving details to regulation by rules of court.—New York Law Journal.

RESPECTIVE RIGHTS OF INDIVIDUAL AND PARTNERSHIP CREDITORS IN BANKRUPTCY PROCEEDINGS.

A consideration of the principles governing the right of the creditors of a partner in a bankrupt firm to proceed against the assets of the firm was presented in the recent case of In re Effinger (D. Md. 1911) 184 Fed. 728. Since at common law the interest of each partner in the partnership assets was only a right to a share in the proceeds of the partnership property after all firm debts had been paid, the individual creditors of one partner could proceed against the firm assets only after all claims due to the creditors of the partnership had been paid and the partnership dissolved. On the other hand, since partnership debts were simply obligations of the individual partners, firm creditors could proceed against the estate of any one of the partners even though sufficient joint assets existed to satisfy all partner ship debts. Though it would seem to be a corollary of this rule that firm creditors who have exhausted the firm assets should be allowed to prove in competition with the creditors of an individual partner against the assets of the individual estate, this question has been the subject of much discussion and disagreement. The courts have now generally adopted the view that since of course the firm creditors have priority in the distribution of firm assets, it is only equitable that the proceeds of the individual estates should be first available to individual creditors. Illogical under this general rule, but more consistent than it with the original theory of a partnership, is the well established exception which recognizes the right of firm creditors, in the total absence of firm assets, to proceed directly against the individual estate, and which, though limited at its inception to specific instances, has in some jurisdictions, by a misconception of its proper scope, been so extended as to affect the whole law of distribution. The Federal Bankruptcy Act of 1898, however, while adopting in terms

the general rule above mentioned, makes no reference to any exception thereto, and the fact that the existence of such an exception, based upon the common law theory of a partnership, is inconsistent with the doctrine of partnership entity laid down by that Act, would indicate that it was intended to be abolished.

In the case under discussion, the rights of an individual creditor of a bankrupt partner whose firm was also bankrupt, were further illustrated by the plaintiff's attempt to prove two claims against the firm. As regards the first of these, the partner had given a deed of trust of land belonging to him individually to a bank, as security for certain firm notes held by it. The bank sold the land, and not realizing from it the amount of the notes, proved the debt against the firm. A portion only of the pro rata dividend awarded to firm creditors was sufficient to satisfy the remainder of the bank's claim. It was held that the partner's estate should be subrogated to the bank's rights against the bankrupt firm, and that the plaintiff could therefore prove the debt. Although at common law it was impossible to allow proof of such a claim, for the reason that it amounted to permitting a partner to prove against himself in competition with his own creditors, the same result was nevertheless reached, on a theory of equitable subrogation, by granting an order setting aside from the firm assets an amount equal to the partner's claim, for the benefit of his individual creditors. The Act of 1898, by making the partnership an entity, and providing that "the court may permit the proof of the claim of the partnership estate against the individual estate and vice versa" removed the technical difficulty of the common law, and the plaintiff's claim in the case under consideration was therefore properly allowed. The plaintiff also sought to prove against the partnership in competition with partnership creditors a debt due from the firm to the estate of the individual partner, her debtor, and to receive a dividend thereon. It was held that although under the statute this debt might be proved, the plaintiff could not receive a dividend until all claims of firm creditors had been satisfied in full. Of course, at common law, for the reasons already mentioned, it was impossible even to allow proof of such a debt, but since in consequence of the Act of 1898 a partnership in such circumstances is now an entity distinct from the persons who compose it, and is therefore capable of becoming indebted to the individual partners, and since the statute specifically provides that proof of such debts may be admitted, the construction put upon it by the court would seem to be an undue restriction of the legislative intent. This conclusion is borne out by the consideration that such an interpretation destroys any effect of the statute upon the substantial rights of the parties.—Columbia Law Review.

BOOK REVIEWS.

WYMAN ON PUBLIC SERVICE CORPORATIONS.

This book in two volumes is one of those which promises to be among "the Standards." The author, Mr. Bruce Wyman, A. M. LL. B., Professor of Law in Harvard University, writes with singular clearness and compactness and the field he is exploring of public control where private right is affected by public interest, is not only interesting but in a measure fascinating. The historical introduction to his consideration of the multiplied activities coming under that control is worthy of very attentive perusal. He gives us the mediaeval policy of regulation, and calls our attention to the characteristic item of regulation imposed "upon those who openly professed a public employment" and the survival and extension of that doctrine where there exists a natural or a virtual monopoly.

One of the tests of this day is monopoly as distinguished from free competition. The author well says: "Whenever the public is subjected to a monopoly the power of oppression inherent in a monopoly is restricted at law. Whenever, on the other hand, competition becomes free, both in law and in fact, the need of governmental regulation ceases, public opinion ceases to demand such regulation and the law withdraws it."

The maxim that a people least governed is best governed is less true now than it used to be, so far at least as material advancement is concerned. In a way, of which a century ago it was not dreamed, advantages not open to full competition are sought and obtained. The public as a public is served in many ways differently than when it thought only in this way of the miller, the innkeeper, the carrier, the ferryman and the wharfinger.

Now have come water, gas, heating, refrigerating, warehousing, log driving, tunneling, elevator, subway, pipe line, telephone and telegraphy companies, which with prior occupancy fetter in a measure different from mere business enterprise that free competition as to which there is no need of regulation.

These undertakings must be controlled, or with the spirit of invention that is multiplying such agencies, they will not only destroy each other, but impoverish the land they are pushing along on the road of progress. Indeed one of the great problems of this age is to make these agencies the handmaids of material prosperity and liberty under enlightened law. It is dangerous to them and dangerous to the public to leave them to work out their own salvation.

This work covers such an extensive field that an analytical review is not attempted, nor do we believe it at all necessary. To say such an effort is well attempted is sufficient. It is down to the current year. The arrangement is logical. The treatment combines the philosophical with the practical. It is a text book and not a mere collation of cases.

The typography is grateful to the eye and in every way the mechanical execution of the volumes is excellent. The volumes are in law buckram and published by Baker, Voorhis & Co., New York. 1911.

THE MODERN LAW OF EVIDENCE.

The first of a four volume work under the above title has just made its appearance. Its author is Mr. Charles F. Chamberlayne of the Boston and New York Bars, and who has been devoting a great part of his professional life to the subject of evidence. He was American Editor of the following well-known works: "Best's Principles of the Law of Evidence;" "International Edition of Best on Evidence" and "Taylor on Evidence."

It is explained by the author of the work of which the first volume has just appeared, with the other three shortly to appear, that: "The modern law of Evidence owes its inception to the combined efforts of an English judge and an American jurist," the former being Sir James Fitzjames Stephen and the latter Professor James Bradley Thayer. From these it is said began a "scientific development of this branch of law."

The table of contents in the first volume is of the four volumes, the first being called "Administration," but under what such general heads the others shall appear is not indicated. But the first seems to run quite faithfully along the line of concerning itself primarily with evidence as meaning the physical means or agencies by which the art of proof is carried into effect.

The text in this volume is clear and the development of the author's purpose quite thorough, and it and the table of contents showing what the other volumes will treat of, promise to give to legal literature a very useful work.

The work comes from the publishing house of Matthew Bender & Company, Albany, N. Y. 1911.

MODERN THEORIES OF CRIMINALITY.

By C. Bernaldo De Quiros; translated from the Spanish by Alfonso De Salvo, Ph. D., with an introduction by W. W. Smiths. Boston, Little, Brown & Co., 1911.

We desire to call the attention of the Bar to this book, as an appetizer. This is the first of the translations published by the American Institute of Criminal Law and Criminology, organized in 1909, the object of which is to make the American legal world, as well as others interested, acquainted with the modern movement in criminology and penology in the several continental countries of Europe.

The book itself is nothing more, and does not pretend to be anything else than a review; while the distinguished author at times lets his personal preferences appear, and even goes into short arguments, the book is in the main confined to a partly historical and partly systematic, enumeration of the various theories of Italian, French and German scholars about the nature of crimes and criminals and their treatment. As such it is very suggestive, sometimes too much so. By this we mean that the author evidently has tried to avoid overlooking anybody having any sort of claim to distinction in the matter, with the result that the book has been filled with names of authors, without it having been possible to explain what are the characteristics of the great mapority of them; the author naturally being much better acquainted with the Romance than with the Germanic languages, the enumeration of Italian, French and Spanish authors is especially full, and in their case, some idea of what they stand for is generally given, while among the Germanic authors, practically those only have been made the subject of a fuller review, whose works have been translated into Italian or French; among them there are several, whose names simply are mentioned, without even giving the titles of their works, in some cases not even their nationality. But without considering such minor objections, the work is an evidence of a very great amount of learning and of an earnest conviction of the absolute necessity, to reach a new understanding and method in the treatment of crimes and criminals.

As a review of the modern theories on criminology, the book is probably as complete as such a work can be made; as a review of what has been done in practice to carry out some of these modern theories, with the results obtained, the book is not quite as complete, nor as uniformly correct, but it gives enough to impress the reader with the enormous amount of earnest work given to penology also, all over the face of the earth, and of the main leading ideas.

We commenced by recommending this book as an appetizer. If the reader, after perusing it, stops there, it will not do him or the society in which he works much more good, than say, one of Jack London's novels. It is an introduction only; after it comes the real study. The institute has also caused to be translated eight of the principal works of some of the foremost continental writers of the new schools, and a list of them is printed in the front of this book, including such names as Gross, Ferri, Garofalo, Saleilles, Bonger, Aschaffenburg. Every one of the books so translated is worth, not only the reading, but the study by every member of the Bar.

All of these works are legal, but they are not systematic works on criminal law. We are of the opinion that they would never have been written, unless the general principles of criminal law had first been worked out systematically. Would it not be worth the while, for the Institute to have translated the Introduction (Einleitung) and General Part (Algemeine Theil) of some standard continental work on positive criminal law. We think, we need to have our brass tacks renewed, or at least burnished up.

T.

HUMOR OF THE LAW.

A short time ago, in the District Court at Burnet, Texas, a dusky damsel appeared before Judge Clarence Martin and, through her attorney, asked to be divorced from her husband on the ground of desertion. Her main witness was an old-time negro of the pure African type, who had a set of teeth that glistened like polished ivory.

"Ephraim," said the attorney, "is it a fact that the plaintiff is a bona fide citizen of Burnet County?"

"No, sah," replied the negro with emphasis, "it am not a fac' dat she am a bony fide citizen. She am in very good order, sah."

ERNEST GOETH,
Weimer, Texas.

Champ Clark loves to tell how, in the heat of a debate Congressman Johnson, of Indiana, called an Illinois representative a jackass. The expression was unparliamentary, and in retraction, Johnson said:

"While I withdraw the unfortunate word, yet, Mr. Speaker, I must admit that the gentleman from Illinois is out of order."

"How am I out of order?" yelled the man from Illinois.

"Probably a veterinary surgeon could tell you," answered Johnson, and that was parliamentary enough to stay on the record.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Amicus Curiae**—Powers.—An amicus curiae may only appear to call the court's attention to facts or situations that may have escaped the court's notice.—In re McClellan's Estate, S. D., 129 N. W. 1037.

2. **Attachment**—Basis.—An attachment against personalty is in the nature of a proceeding in rem and of an action in personam.—H. L. Griffin Co. v. Howell, Utah, 113 Pac. 326.

3. **Attorney and Client**—Effect of Death of Client.—The authority of the attorneys ceases on client's death until there is a substitution of his administrator.—State v. District Court of Second Judicial Dist., Silver Bow County, Mont., 113 Pac. 472.

4. **Auctions and Auctioneers**—Sale of Property.—Property may be sold at public auction to the highest bidder for the maximum possible amount, though a like public auction under other conditions and at other times might bring many times more and consequently a much larger maximum possible amount.—Pike v. State Board of Land Com'rs, Idaho, 113 Pac. 447.

5. **Bankruptcy**—Adjustment of Claims.—Receivers in bankruptcy prior to adjudication cannot adjust claims or properly defend suits thereon.—In re Heim Milk Product Co., D. C., 183 Fed. 787.

6.——Amendment of Petition.—Amendments to a bankruptcy petition relating to the number of the petitioning creditors, the amount and nature of their claims, the occupation of the debtor, errors and deficiencies in the original petition, etc., may be made more than four months after the commission of the act of bankruptcy.—Milan v. Exchange Bank of Mannington, C. C. A., 183 Fed. 753.

7.——Appraisement.—Where distress proceedings were stayed, the landlord's rights, if any thereunder, in bankruptcy proceedings against the tenant, were not affected by the landlord's failure to proceed to an appraisement.—In re Boschelli, D. C., 183 Fed. 864.

8.——Brokers.—Where a broker pledged his customer's stock and then became a bankrupt, the customer, in order to obtain a preference, must prove a conversion, and must also trace his stock to the specific proceeds out of which he claims a preference.—In re A. O. Brown & Co., D. C., 183 Fed. 861.

9.——Claims.—Claims against a bankrupt's estate are not to be settled or liquidated by a suit in the state court unless the judge or referee so directs.—In re Heim Milk Product Co., D. C., 183 Fed. 787.

10.——Composition.—A composition held not subject to vacation at the instance of a nonconsenting creditor after the expiration of the six months allowed to attack the same.—In re Ennis, D. C., 183 Fed. 859.

11.——Corporations Subject.—Bankr. Act July 1, 1898, does not include in the classes of corporations thereby made subject to the act public utility corporations, such as gas and electric companies principally engaged in supplying means for lighting in cities and other communities.—In re Hudson River Power Transmission Co., C. C. A., 183 Fed. 701.

12.——Creditor's Committee.—An attorney, employed by a creditors' committee to act for it in the operation of the bankrupt's affairs before bankruptcy, held without claim or lien against the bankrupt's assets for services.—In re Crave & Martin Co., C. C. A., 183 Fed. 769.

13.——Election of Trustee.—Where a bankrupt's counsel and clerk owned claims which were valid, their relationship was no reason for excluding the holders from voting at an election for trustees.—In re Ployd, D. C., 183 Fed. 791.

14.——Exemptions.—Under Code 1906, sec. 2141, exempting to an insured the proceeds of a policy of life insurance, the cash surrender value is included in the "proceeds," and the administrator held entitled to the whole proceeds.—Dreyfus v. Barton, Miss., 54 So. 254.

15.——Fraudulent Purchase.—A seller of goods to a bankrupt, in order to recover the same from the bankrupt's trustee, must show, not only that the bankrupt had knowledge of his financial condition when he purchased the goods, but that he had no reasonable expectation of being able to pay for them.—In re Berg, D. C., 183 Fed. 885.

16.——Fraudulent Sales.—Sellers of personal property to a bankrupt under false representations as to the amount of his assets, etc., held entitled to reclaim the property from the bankrupt's trustee without proof of actual insolvency.—In re Bendall, D. C., 183 Fed. 816.

17.——Hearing on Claims.—There is nothing in Bankruptcy Act or in the rules in bankruptcy, prescribing any particular form for objections to claims, which matter rests largely in the discretion of the referee, and where a claimant appeared in person and by attorney at a hearing

on his claim, and testified and took part in the examination of other witnesses without objection, it is immaterial whether pleadings were filed by the objectors or whether formal notice was given him of the objections.—Orr v. Park, C. C. A., 183 Fed. 683.

18.——Involuntary Petition.—Where involuntary bankruptcy petitioners are creditors to an amount sufficient to satisfy the act, the exact amount due them is immaterial.—In re Hughes, D. C., 183 Fed. 872.

19.——Partnership.—Where a firm converted certain property owing to a bank and then became bankrupt the bank's acceptance of a composition agreement offered by one of the partners did not bar its right to file a claim for the balance against the individual estate of the other partner.—In re Coe, C. C. A., 183 Fed. 745.

20.——Petition to Revise.—Validity of a deed of trust given by a bankrupt, arising in bankruptcy proceedings, held reviewable by a petition to superintend and revise.—Ritchie County Bank v. McFarland, C. C. A., 183 Fed. 715.

21.——Property of Bankrupt.—A sale of goods by a person contemplating bankruptcy is not complete until delivery.—In re Spann, D. C., 183 Fed. 819.

22.——Provable Claims.—The obligation of an indorser is a provable claim, in bankruptcy, even though subject to the condition of presentment and notice of protest.—In re Buzzini & Co., D. C., 183 Fed. 827.

23.——Receivers.—Under Bankruptcy Act July 1, 1898, c. 541, secs. 11, 63, 30 Stat. 549, 562 (U. S. Comp. St. 1901, pp. 3426, 3447), suits against bankrupts, their receivers, or any one involving the bankrupts' property, would not be authorized prior to the appointment of a trustee.—In re Heim Milk Product Co., D. C., 183 Fed. 787.

24.——Voidable Preferences.—Knowledge of a preferred creditor's agent that a preference was intended renders it voidable under the express provisions of Bankr. Act July 1, 1898, without regard to the general rules as to what knowledge of an agent is notice to his principal.—Campbell v. Balcomb, C. C. A., 183 Fed. 766.

25. **Banks and Banking**—National Banks.—An indictment against an officer of a national bank for willful misapplication of funds of the bank, must allege facts showing a conversion of such funds.—United States v. Heinze, C. C., 183 Fed. 907.

26.——Representation by Officers.—The cashier of a bank in liquidation held to possess the power to manage and control the bank, so that his acts are binding on the bank.—Metzger v. Southern Bank, Miss., 54 So. 241.

27.——State Regulation.—The rule that a state can exercise no control over a national bank excepts the bank only from such legislation as tends to impair its utility as an instrumentality of the federal government.—State v. Clement Nat. Bank, Vt., 78 Atl. 944.

28. **Bills and Notes**—Indorsement.—A corporation having indorsed certain notes for the maker and received property as security therefor, would not be allowed to keep the property and throw the loss on the maker merely because the holder could not fasten liability on it as indorser.—In re Buzzini & Co., D. C., 183 Fed. 827.

29.——Innocent Holders.—A life insurance pany suing on receipts for advances to an agent held not an innocent holder so as to preclude him from showing that his obligation for repayment was not absolute.—Allenberg v. Wainwright, Wash., 113 Pac. 585.

30.——Law Merchant.—A note was long overdue under the law merchant and statutes, where it was unpaid five years after it was executed.—Van Dyke v. Grand Trunk Ry. Co. of Canada, Vt., 78 Atl. 958.

31.——Pleading.—Where three different parties own notes purporting to be made by defendant, and two are forgeries, a general denial to the suits of the three plaintiffs, when defendant did not know which was the genuine note, will not forfeit his right to a judgment decree that he owes only the genuine note.—Sickmann v. Vergez, La., 54 So. 295.

32. **Bond**—Defense.—The assignee of a bond, taking it without inquiry, takes it subject to any defense to which it was subject in the hands of the obligor.—Volk v. Shoemaker, Pa., 78 Atl. 933.

33. **Boundaries**—Acquiescence.—In an action to establish a boundary line, the pleadings need not put in issue the location of a government quarter corner.—Weikamp v. Jungers, Iowa, 129 N. W. 953.

34. **Carriers**—Discrimination in Rates.—An action against a carrier for granting unlawful rebates to plaintiff's competitors held not maintainable in the first instance in the federal circuit court, being within the exclusive original jurisdiction of the Interstate Commerce Commission.—Mitchell Coal & Coke Co. v. Pennsylvania R. Co., C. C. A., 183 Fed. 908.

35.——Joint Liability.—Connecting railroad carriers held jointly liable to one riding on a through train for an injury received on the road of one through the negligence of a servant of the other, who, in cleaning the car preparatory to its delivery to his employer, left sweepings in the aisle, creating a dangerous condition.—Grand Trunk Ry. Co. v. Parks, C. C. A., 183 Fed. 750.

36.——Limitation of Liability.—A shipper, who stipulates when the shipment is received that the goods are of a certain value, is estopped from claiming a greater amount in an action for damages for their loss or injury.—Reeder v. Wells, Fargo & Co., Cal., 113 Pac. 342.

37.——Live Stock Shipment.—A shipment of live stock held to have been made under a written contract, though the shipper had no opportunity to read the contract before entering the train.—Hayes v. Missouri, K. & T. Ry. Co., Kan., 113 Pac. 421.

38.——Mistake in Quoting Rate.—Where a carrier unintentionally made a mistake in quoting a freight rate, held, that the shipper could not recover where the larger regular rate was subsequently collected.—Schenberger v. Union Pac. R. Co., Kan., 113 Pac. 433.

39.——Trespassers.—One attempting to ride on a train without a ticket, pass, or payment of fare, is ordinarily a trespasser.—Daley v. Chicago & N. W. Ry. Co., Wis., 129 N. W. 1062.

40. **Charities**—Liability for Negligence.—Character of an institution as a public charity is not affected by charging those able to pay for use of its rooms.—Jensen v. Maine Eye & Ear Infirmary, Me., 78 Atl. 898.

41. **Commerce**—Safety Appliance Act.—A car of an interstate railroad company, having a defective coupler, left on a track in a switch yard to be repaired, held being "used" within the meaning of the safety appliance act.—Erie R. Co. v. Russell, C. C. A., 183 Fed. 722.

42. **Constitutional Law**—Charter of Private Corporation.—The charter of a private corporation held a contract between the corporation and the stockholders within the protection of Const. U. S., art 1. sec. 10.—Avondale Land Co. v. Shook, Ala., 54 So. 268,

43.——Repeal of Statute.—Change in the penalty prescribed in a statute punishing theft without a saving clause releases those prosecuted under the repealing law.—State v. Guillory, La., 54 So. 297.

44. **Contracts**—Building Contracts.—Right to forfeit a building contract does not carry right to refuse to pay for labor and materials, not conforming to the contract, but received and beneficially used.—Voightmann v. Wilmington Trust Bldg. Corporation, Del., 78 Atl. 920.

45.——Consideration.—That a promise given for a promise is dependent on a condition held not to affect its validity.—Chappell v. McMillan, N. M., 113 Pac. 611.

46.——Debt of Another.—Upon a promise to pay the debt of another out of funds or property received from the debtor for that express purpose, not only the debtor himself, but the creditor, may sue, though the promise was made to the debtor alone.—Burson v. Bogart, Colo., 113 Pac. 516.

47.——Fraud.—Fraud vitiates all contracts on the ground that the party deceived never consented to the contract—Bretthauer v. Foley, Cal., 113 Pac. 356.

48.——Implied Contracts.—The implication of a contract arising from proof of circumstances from which an intention to contract is implied as matter of fact, though springing into existence as a matter of law, is rebuttable.—Wojahn v. National Union Bank of Oshkosh, Wis., 129 N. W. 1068.

49. **Corporations**—Estoppel.—A corporation cannot repudiate an unauthorized transaction and retain the fruits thereof.—Mountain Waterworks Const. Co. v. Holme, Colo., 113 Pac. 501.

50.——Foreign Corporations.—A deed of land to a foreign corporation which has not complied with St. 1898, sec. 1770b, held a nullity, and a prior mortgagee of the vendor, under an unrecorded mortgage, may take advantage thereof.—Hanna v. Kelsey Realty Co., Wis., 129 N. W. 1080.

51.——Implied Authority.—A local freight agent has no implied authority to settle claims for injury to a live stock shipment.—Betus v. Chicago, B. & Q. R. R., Iowa, 129 N. W. 962.

52.——Powers.—A corporation may bind itself by a contract incident to those things which the legislature has authorized in the corporation's charter, unless expressly prohibited.—State v. Clement Nat. Bank, Vt., 78 Atl. 944.

53.——Receivers.—Where affairs of a corporation are grossly mismanaged, minority stockholder held entitled to protection, including appointment of receiver, if necessary.—Van Viett v. Evangeline Oil Co., La., 54 So. 286.

54.——Receivership.—Where a judgment creditor may enforce the liability of stockholders, a receiver will not be appointed.—Forsell v. Pittsburg & Montana Copper Co., Mont., 113 Pac. 479.

55.——Transfer of Assets.—Directors of a corporation may not transfer its property to themselves when insolvency is impending as security for claims previously made.—In re Salvator Brewing Co., D. C., 183 Fed. 910.

56. **Courts**—Jurisdiction.—A court cannot divest itself of jurisdiction by erroneous decision that it has no jurisdiction.—H. L. Griffin Co. v. Howell, Utah, 113 Pac. 326.

57. **Criminal Evidence**—Admissibility.—In a prosecution for maintaining a common liquor nuisance, accused's receipts for freight shipments of goods designated "Beer" held admissible.—State v. Tracy, N. D., 129 N. W. 1033.

58. **Criminal Law**—Confession.—The corpus delicti of the crime of arson cannot be proved solely by a confession of the one accused.—Bolden v. State, Miss., 54 So. 241.

59.——Ordinance.—The repeal of a city ordinance without any saving clause abates all prosecutions pending under it.—Perkins v. City of Boswell, N. M., 113 Pac. 609.

60.——Plea in Abatement.—It is not a good plea in abatement to an indictment that it was returned by a grand jury of which the complaining witness was a member.—Krause v. State, Neb., 129 N. W. 1020.

61. **Damages**—Certainty as to Amount.—Difficulty in ascertaining damages resulting from wrongful attachment held not to prevent an award.—Wall v. Hardwood Mfg. Co., La., 54 So. 300.

62.——Liquidated Damages.—Where a builder's contract provides for liquidated damages for delay, no other damages should ordinarily be allowed for that cause.—Jobst v. Hayden Bros., Neb., 129 N. W. 992.

63. **Deeds**—Cancellation.—Where an old man conveyed his property to his niece in consideration of love and affection, retaining a life estate in himself, and the deed was voluntarily and deliberately executed, the court could not set it aside.—Bretthauer v. Foley, Cal., 113 Pac. 356.

64.——Delivering to Grantee.—Where a deed was delivered to the grantee, it took effect at once and vested the legal title in the grantee; but it could not be delivered to the grantee in escrow.—Dennison v. Barney, Colo., 113 Pac. 519.

65.——Fraud.—A deed should not be set aside for false representations, unless their making and falsity are clearly proved.—Russell v. Carman, Md., 78 Atl. 903.

66.——Requisites.—Rule that body of deed must show who are grantors held met, if enough is shown from which names of grantors can be made certain.—Sloss-Sheffield Steel & Iron Co. v. Lollar, Ala., 54 So. 272.

67. **Divorce**—Dispositition of Property.—Where the title to land is left undisturbed in divorce, the decree in effect adjudges it in the party who holds it.—Roberts v. Playle, Iowa, 129 N. W. 945.

68. **Eminent Domain**—Assessment of Damages.—In proceedings to condemn land for railroad purposes, the owner cannot show that he had intended to divide the land into building lots, and had contracted to lease the same.—Ogdon v. Pennsylvania R. Co., Pa., 78 Atl. 929.

69. **Escrows**—Nature and Duty.—A bank held liable where it delivered the proceeds of a check deposited in escrow to one of the parties

without the consent of the other.—Davisson v. Citizens' Nat. Bank of Roswell, N. M., 113 Pac. 598.

70. **Evidence**—Admissibility.—In a suit by a vendor for the specific performance of a contract of sale, parol evidence is admissible to show that the contract was induced by mistake. —Ginther v. Townsend, Md., 78 Atl. 908.

71.——Burden of Proof.—A finding in favor of the party having the burden of proof may rest on his uncorroborated evidence alone clearly contradicted by the adverse party.—Wojahn v. National Union Bank of Oshkosh, Wis., 129 N. W. 1068.

72. **Factors**—Instructions.—Where instructions given by a principal to a factor not contemporaneous with the advancement are acquiesced in, they are as binding as if given at that time.—Goesling v. Gross, Kelly & Co., N. M., 113 Pac.. 608.

73. **Fire Insurance**—Wife's Clothing.—Where "wearing apparel of the family" is covered by a clause in a fire insurance policy issued to a husband, the insurer may not claim that a husband has no insurable interest in his wife's clothing.—German Union Fire Ins. Co. of Baltimore v. Cohen, Md., 78 Atl. 911.

74. **Fixtures**—Intent to Annex.—Certain machinery sold to a corporation under a conditional sale held not converted into realty, so that certain purchasers and bondholders had no higher right to the machinery than the corporation itself.—Wickes Bros. v. Island Park Ass'n, Pa., 78 Atl. 934.

75. **Fraud**—Duty to Disclose Facts.—Where a seller, by artifice or trick, prevents a buyer from inquiry, he is liable for fraudulent concealment.—Morgan v. Hodge, Wis., 129 N. W. 1083.

76. **Frauds, Statute Of**—Delivery of Stock.—Where stock was delivered and accepted by a purchaser, who promised to pay the price, the transaction was taken out of the statute of frauds.—East v. McClung, Colo., 113 Pac. 517.

77.——Pleading.—Where the statute of frauds is relied on as a defense, it must be specially pleaded.—Dennison v. Barney, Colo., 113 Pac. 519.

78.——Written Contract.—The time of performance of a written contract within the statute of frauds may be enlarged by a subsequent oral agreement.—Kingston v. Walters, N. M., 113 Pac. 594.

79. **Highways**—Road Tax.—Equity will not compel the refunding of a road tax levied on a wrong valuation if the tax has been paid.—Shenango Furnace Co. v. Fairfield Tp., Pa., 78 Atl. 937.

80. **Homicide**—Self-Defense.—Where the evidence did not present the issue of self-defense, accused cannot complain of an instruction on such question, though erroneous.—Territory v. Ayers, N. M., 113 Pa. 604.

81.——Self-Defense.—Where the issue of self-defense was presented, it was error to exclude evidence of threats made by decedent and communicated to accused.—Offitt v. State, Okl., 113 Pac. 554.

82. **Husband and Wife**—Assignment of Mortgage.—An assignment by a husband to a wife of a mortgage on land of a third person held not a contract between the husband and wife as to realty of either, prohibited by Rev. Laws 1905, sec. 3509.—Kerston v. Kerston, Minn., 129 N. W. 1051.

83.——Estoppel.—Woman estopped by acts before marriage held not relieved from operation thereof on execution of deed without joinder of husband after marriage.—Sloss-Sheffield Steel & Iron Co. v. Lollar, Ala., 54 So. 272.

84. **Interstate Commerce**—Express Companies. —Delivery of interstate packages by an express company's wagons from a railroad or a steamer terminal to the consignees held interstate commerce within the exclusive jurisdiction of the federal government.—Barrett v. City of New York, C. C., 183 Fed. 793.

85.——Foreign Corporations.—Foreign corporation not having complied with St. 1898, sec. 1770b, having sold to a resident certain goods in interstate commerce, held authorized to take and foreclose a chattel mortgage to secure the price as a part of the interstate commercial transaction.—F. A. Patrick & Co. v. Deschamp, Wis., 129 N. W. 1096.

86. **Judgment**—Collateral Attack.—The only fraud that can be relied on to avoid a judgment on collateral attack is that which affects the jurisdiction.—Weedman v. Fowler, Kan., 113 Pac. 390.

87.——Confession.—Power to confess judgment by warrant of attorney is governed by the common law as modified by the statutes and the decisions of the courts of last resort in this country.—Halfhill v. Malick, Wis., 129 N. W. 1086.

88.——Joint Liability.—That one of several makers of a note sued on was not served held not to prevent judgment against those served.—Leusch v. Nickel, N. M., 113 Pac. 595.

89. **Limitation of Actions**—Action on Note.—That limitations have run against note of stockholder to corporation held not to affect his right to accounting by the corporation for dividends. —Mountain Waterworks Const. Co. v. Holme, Colo., 113 Pac. 501.

90.——Mortgages.—A mortgage in the hands of a mortgagee in possession never becomes barred by lapse of time, so that the mortgagor can in equity quiet his title without first paying it.—Pettit v. Louis, Neb., 129 N. W. 1005.

91. **Master and Servant**—Fellow Servants.—The feeder of a clay machine whose duty it is to give signals to the pressman of a clay machine when to operate it held not a fellow servant of the clay mixer in giving such signals. —Grosjean v. Denny-Renton Clay & Coal Co., Wash., 113 Pac. 570.

92.——Locomotive Engineers.—In a suit for death of a locomotive engineer caused by a boiler exploding, held erroneous to direct a finding for the company, if locomotives of the class used were in general use by other reasonably prudent railways.—Kirby v. Chicago, R. I. & P. Ry. Co., Iowa, 129 N. W. 963.

93.——Negligent Signals.—An employer held liable for death of a structural iron worker caused by losing his balance by unexpected movement of a beam, resulting from negligent signals.—Cole v. Gerrick, Wash., 113 Pac. 565.

94.——Simple Tools.—A cant hook held not a simple tool, but one that a servant might assume to be reasonably fit.—Parker v. W. C. Wood Lumber Co., Miss., 54 So. 252.

95. **Mechanics' Liens**—Enforcement.—Purchaser of premises upon which there is a valid mechanic's lien cannot compel the lienor to exhaust his legal remedies against the original debtor before enforcing his lien.—Erickson v. Russ, N. D., 129 N. W. 1026.

96. **Monopolies**—Action for Damages.—Sherman Anti-Trust Act July 2, 1890, does not give a right of action to recover treble damages for injury to a corporation by an illegal conspiracy or combination to restrain or monopolize interstate commerce to a stockholder or creditor of such corporation.—Loeb v. Eastman Kodak Co., C. C. A., 183 Fed. 704.

97.——Conspiracy in Restraint of Trade.—A conspiracy in restraint of trade denounced by the anti-trust act cannot be formed between two corporations by the acts and thoughts of one person acting as agent of both corporations. —United States v. Santa Rita Store Co., N. M., 113 Pac. 620.

98. **Municipal Corporations**—Abatement of Nuisance.—A city, suing to abate a nuisance caused by an obstruction in a stream, held not required to prove that the obstruction is a nuisance; but the person constructing it must show that the provision of the ordinance which he violates is unreasonable.—Sioux City v. Simons Hardware Co., Iowa, 129 N. W. 978.

99.——Liability of Abutting Street Owner.—Owner of building adjacent to street occupying space under street as room in connection with building held liable for damages caused by neglect to maintain excavation in safe condition.—City of Omaha v. Philadelphia Mortgage & Trust Co., Neb., 129 N. W. 996.

100. **Negligence**—Pleading.—In an action founded on negligence, plaintiff must recover on some act of negligence alleged in the petition.—Greco v. Western States Portland Cement Co., Kan., 113 Pac. 410.

101. **Officers**—Compensation.—Compensation is not indispensable to an office.—Childs v. State, Okl., 113 Pac. 545.

102. **Payment**—Presumption.—The presumption that all debts are paid after 20 years from maturity grows stronger with each succeeding year.—Cannon v. Hileman, Pa., 78 Atl. 932.

103. **Pleading**—Complaint Containing Several Causes of Action.—A complaint containing several causes of action which does not separately state them should be attacked by motion to make more definite and certain.—Peterson v. Pantheon Lumber Co., Wash., 113 Pac. 562.

104. **Post Office**—Use of Mail.—The unrestricted use of the mails is not one of the fundamental rights guaranteed by the Constitution.—Warren v. United States, C. C. A., 183 Fed. 718.

105. **Principal and Agent**—Fraud of Agent.—Attempts of an agent employed to do annual assessment work on a mining claim who fails to do so to relocate the claim held a fraud upon his principal.—O'Neill v. Otero, N. M., 113 Pac. 614.

106. **Quieting Title**—Possession of Plaintiff.—Title in fee carries presumptive possession entitling plaintiff to sue to quiet title, in absence of actual entry in adverse possession by another.—Empire Ranch & Cattle Co. v. Bender, Colo., 113 Pac. 494.

107.——Unpaid Mortgage.—The purchaser of the equity of redemption on foreclosure cannot question the title acquired, unless he pays or tenders the amount of the mortgage debt and interest.—Westerfield v. Howell, Neb., 129 N. W. 986.

108. **Railroads**—Negligent Fires.—A railroad company is bound to exercise the care of a prudent man in like circumstances to prevent the spread of fires started from sparks from its engine.—Van Dyke v. Grand Trunk Ry. Co. of Canada, Vt., 78 Atl. 958.

109. **Reference**—Findings of Referee.—The rule that the findings of a referee must be affirmed by the trial court unless they are against the clear preponderance contemplated a strong presumption in favor of the finding.—Wojahn v. National Union Bank of Oshkosh, Wis., 129 N. W. 1068.

110. **Removal of Causes**—Causes Removable.—An original proceeding for mandamus in the state supreme court arising under the laws of the United States held, under Act Aug. 13, 1888, not removable to the United States circuit court, proper procedure being a writ of error from the United States Supreme Court under Rev. St. § 709 (U. S. Comp. St. 1901, p. 575).—State v. White River Valley Ry. Co., S. D., 129 N. W. 1034.

111. **Sales**—Contract.—Where goods were sold to defendant, but charged to another at her request, she was not thereby relieved from liability for the price.—F. A. Patrick & Co. v. Deschamp, Wis., 129 N. W. 1096.

112.——Delivery.—An allegation of delivery in an action for breach of a buyer's contract of sale held sufficiently established by proof of a tender and a refusal to permit delivery by the buyer.—Spencer v. Pike County, C. C., 183 Fed. 894.

113.——Passing of Title.—Title to property sold held to pass to the buyer upon delivery f. o. b. at a particular place, unless the contract reserves to the seller the right of property, notwithstanding delivery to the carrier.—Dentzel v. Island Park Ass'n., Pa., 78 Atl. 935.

114.——Payment of Price.—Interest on the price of goods sold held to run from date of accentance, notwithstanding subsequent negotiations respecting payment.—Denver Pressed Brick Co. v. Young, Colo., 113 Pac. 499.

115. **Searches and Seizures**—Exemplary Damages.—Plaintiff could recover compensatory damages for the wrongful invasion of his home in search of stolen property.—Krehbiel v. Henkle, Iowa, 129 N. W. 945.

116. **Sheriffs and Constables**—Liability on Bond.—A sheriff is liable on his bond for negligent acts of his deputy, if such acts pertain to the office of sheriff.—People v. Beach, Colo., 113 Pac. 513.

117. **Specific Performance**—Contracts Enforceable.—Where one makes a misrepresentation whereby another is induced to enter into a contract, the contract is not subject to specific performance.—Ginther v. Townsend, Md., 78 Atl. 908.

118.——Estoppel to Urge Objection.—Where defendant entitled to payment within a time fixed in writing, agrees to extend the time, he is estopped from claiming breach of the agreement for failure to pay within the time first stated.—Kingston v. Walters, N. M., 113 Pac. 594.

119. **Taxation**—National Banks.—The state has no jurisdiction to tax the credit to which a nonresident owner of a local interest-bearing national bank deposit is entitled.—State v. Clement Nat. Bank, Vt., 78 Atl. 944.

120.——Power to Make Reassessment.—Where property has been actually assessed and without fraud, though it is under the value of the property, it cannot be disregarded and the property assessed as omitted.—Woodbury County v. Talley, Iowa, 129 N. W. 967.

121.——Tax Deeds.—Tax deeds held void where the land was struck off to the county on the first day of the general tax sales, contrary to the recitals in the deeds.—Empire Ranch & Cattle Co. v. Lanning, Colo., 113 Pac. 491.

122. **Trusts**—Resulting Trusts.—Where real estate is purchased by one with money furnished by another, there is a resulting trust.—Leroy v. Norton, Colo., 113 Pac. 529.

123.——Trustee Ex Maleficio.—One taking advantage of his position as agent, thereby fraudulently obtaining title to mining claims belonging in equity to his principal will be charged as a trustee ex maleficio.—O'Neill v. Otero, N. M., 113 Pac. 614.

124. **Vendor and Purchaser**—Mortgages.—Generally, in the absence of fraud, the assignee of a bond for title, secures all the rights to which the assignor was entitled.—McIntire v. Garmany, Ga., 70 S. E. 198.

125.——Right to Rent.—In general unaccrued rent passes to the purchaser of the title unless reserved.—Hall v. Hall, Iowa, 129 N. W. 960.

126. **Warehousemen**—Failure to Deliver Property Stored.—Where a warehouseman refuses to deliver property stored, the bailor may recover its market value.—Lightsey v. Lee, Ga., 70 S. E. 179.

127. **Waters and Water Courses**—Duty to Furnish Water.—A water company's duty to furnish water on a consumer's premises for fire extinguishment, can be created only by express contract between the parties.—Niehaus Bros. Co. v. Contra Costa Water Co., Cal., 113 Pac. 375.

128.——Reservoir Sites.—Approval of a reservation site held to segregate land from the public domain, precluding entry by another.—O'Reilly v. Noxon, Colo., 113 Pac. 486.

129. **Wills**—Construction.—A bequest of certain real estate to testator's widow, "her heirs, viz.: her children and grandchildren and assigns," held to vest her with a life estate only, and not a fee.—Hall v. Hall's Estate, Vt., 78 Atl. 971.

130.——Mental Capacity.—Mental capacity to direct the terms of a will changing a former will held not inconsistent with an insane delusion causing such change.—Harbison v. Beets, Kan., 113 Pac. 423.

131.——Specific Legacy.—A specific legacy is a bequest of a particular thing that can be distinguished from others of the same kind.—In re Parsons' Estate, Iowa, 129 N. W. 955.

132. **Work and Labor**—Implied Contracts.—Where one performs valuable services for another at the latter's request, the law implies as matter of fact the accounting of a promise by the latter and acceptance thereof by the former to pay the reasonable value for services.—Wojahn v. National Union Bank of Oshkosh, Wis., 129 N. W. 1068.